

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re ) Fair Hearing No. 9521  
 )  
Appeal of )

## INTRODUCTION

The petitioner appeals the Department of Social Welfare's decision terminating her ANFC-absent parent (AP) grant. The issue is whether the petitioner's child is deprived of parental support due to the absence from the home of his father. The more precise issue is whether the "joint custody" arrangement of the child's parents constitutes "continued absence" of a parent pursuant to the applicable regulations.

## FINDINGS OF FACT

The petitioner and her husband were recently divorced. Based on the stipulation of the petitioner and her husband, the Court awarded joint custody of the couple's eight-year-old child to the petitioner and her husband. A copy of the order in its entirety<sup>1</sup> is appended to this recommendation.

The petitioner and the department agree that the divorce order contemplates that each parent shall have the child with him or her roughly half-time. For several months the petitioner and her husband have followed a routine whereby the husband has the child with him at his house on weekends and overnight two weekdays. At all other times the child is with the petitioner. The petitioner gets the child ready for

school every day (the father always returns the child to the petitioner's house early in the morning on school days), and the child returns to the petitioner's house every day after school.

The child has possessions at both parents' houses. He has his own room at each house, although he and the petitioner remained in the same house after the parents' separation. The father now lives in another town about 6 miles from the petitioner's house.

While the contemplation and arrangement of the parents is for 50/50 joint custody in most every aspect of the child's upbringing, it must be found that the child's primary home is with the petitioner. The Court has so designated this for purposes of the child's education. See Judgement Order, paragraph 4(a). The child lived in the petitioner's home before the separation and has not moved. There is no question that the father is physically absent from the petitioner's home, and that because of his absence his support, physical care and guidance of the child has substantially diminished.

ORDER

The department's decision is reversed.

REASONS

The department has determined that because of the nearly-equal joint custody arrangement of the parents, the child is not "deprived of parental support" within the

meaning of the regulations. W.A.M. § 2331 provides, in pertinent part (and with emphasis added):

Continued absence of a parent refers to physical absence of a parent from the home for one of the following reasons, the nature of which interrupts or terminates the parent's functioning as a provider of maintenance, physical care or guidance for the child:

. . . .

2. Divorce or legal separation of the parents.

. . . .

W.A.M. § 2302.12 includes the following:

A "home" is defined as the family setting maintained . . . in which the relative assumes responsibility for care and supervisions of the child. . .

In this case it must be concluded that the child's primary "home", despite the nearly-equal custody arrangement of the parents, is with the petitioner. The Court has decreed that for the "purpose of establishing residency for school tuition, (petitioner) shall provide the primary residence of the child." Id. paragraph 4(a). The petitioner, in fact, does so. There is no other aspect of the custody arrangement in which the father's home can be considered primary.

16 V.S.A. § 1075, the state education statute that defines "legal residence" for purposes of tuition for local school districts, includes the following:

(a) For the purpose of this title, the legal residence or residence of a pupil is where his parent or legal guardian resides . . .

As noted above, the Court has decreed that the child's primary, or "legal", residence for tuition purposes is with the petitioner. Absent evidence to the contrary, consistency dictates that the child's primary residence for ANFC purposes should also be that of the petitioner.

The concept of a "primary" home for ANFC purposes was set forth by the Human Services Board in Fair Hearing No. 5553 (decided July 15, 1983). The Board's findings in that case, and the legal conclusions which sprang from them (i.e., that the petitioner and her child met the definition of "absence" under W.A.M. § 2331), were expressly upheld by the Vermont Supreme Court in Munro-Dorsey v. Department of Social Welfare, 144 Vt 614 (1984). Concededly, the facts of the instant case establish a much truer "joint custody" arrangement than what was the case in Fair Hearing No. 5553. This does not mean, however, that the petitioner's child cannot, or does not, have a "primary home". He does--and, as found above, it is with the petitioner.

In Fair Hearing No. 5553, and again in this case, it appears the department's primary concern is that both parents in a joint custody situation could qualify for ANFC--and the department would end up paying two grants for the same child.<sup>2</sup> This cannot occur, however, as long as the word "home" in W.A.M. § 2331 (see emphasis, supra) is interpreted to mean the child's "primary home" or "legal residence". The board recognizes that there may be cases in

which it is difficult, if not impossible, to make this factual determination (See Munro-Dorsey, id. at p 616) --and that those cases will be difficult to resolve. (See also Fair Hearing No. 5553, pp 5-7.) As noted above, however, in this case, as in Fair Hearing No. 5553, it can be established that the child has one primary residence. Thus, only the petitioner--and not the child's father--can qualify for ANFC under § 2331. (See Fair Hearing No. 5553, id. at p 5, and Fair Hearing No. 6345.)

Since the evidence establishes that the child's primary "home" in this case is with the petitioner, and since the child's father is "absent" from this home within the meaning of § 2331, it must be concluded that the petitioner is eligible for ANFC. The department's decision is reversed.

#### FOOTNOTES

<sup>1</sup>The parties informed the hearing officer that the Court has not yet formally issued its final decree. However, the parties agreed that the decree, when issued, will be in identical form to the submitted copy.

<sup>2</sup>The hearing officer and the board assume that the department was a party to the petitioner's divorce case (see V.R.C.P. 80(b)), and could have--but did not--raise this concern to the Court. The Court, itself, though certainly not ruling on the petitioner's eligibility for ANFC, was fully cognizant of the fact she was receiving benefits (see Order, paragraphs 5 and 9), and it does not appear that it had a problem with her continuing to do so despite the joint custody arrangement. As a practical matter, the petitioner's husband, who appeared as a witness (for the department) at the fair hearing, indicated he has no need or intention of applying for ANFC--though, admittedly, his representations in this regard are of no relevance as to the petitioner's eligibility.